No. 20939

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

1965 Term

WESTERN CONSTRUCTORS, INC., a corporation,

Counterclaimant-Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,

Counterdefendant-Appellee.

WESTERN CONSTRUCTORS, INC., a corporation,

Defendant-Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,

Plaintiff-Appellee.

Appeal from the United States District Court for the District of Arizona

BRIEF OF COUNTERCLAIMANT-APPELLANT AND DEFENDANT-APPELLANT WESTERN CONSTRUCTORS, INC.

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JURISDICTION

(a) The District Court.

Southern Pacific Company, (hereinafter referred to as "Southern Pacific") filed its complaint in the United States District Court for the District of Arizona in three counts seeking money damages against Western Constructors, Inc., (hereinafter referred to as

"Western") in the sum of $700,000.00 plus $50,000.00 attorney's fees claimed to have been suffered by Southern Pacific Company through the derailing of one of its freight trains near Picacho, Arizona, October 24, 1963, for which loss it alleged Western was legally liable. One other corporation and two individuals were also named as defendants, the corporation as a citizen of Arizona, with its principal place of business in Arizona, and the two individuals as citizens of Arizona. The cause, as tried, involved only the issues of liability of Western to Southern Pacific upon Count Two of the Complaint, for indemnity, and of Southern Pacific to Western upon Western's counterclaim.

Western filed its counterclaim against Southern Pacific for money damages in the sum of $30,000.00 claimed to have been suffered by Western in said freight train derailment for which it alleged Southern Pacific was liable.

It was alleged in the complaint and admitted by all parties that Southern Pacific was a Delaware corporation with its principal place of business in California and that Western was a Texas corporation with its principal place of business in Texas. (T.R. 1,2,3,4,12,16,17).

The district court's jurisdiction therefore rested upon the authorization contained in Section 1332, Title 28 U.S.C. The requisite diversity of citizenship between plaintiff and defendants and between counterclaimant and counterdefendant was alleged and in good faith admitted by Southern Pacific and Western.

The District Judge, by stipulation of the parties, severed the trial of the liability issues from the damage issues, and only the liability issues were tried to a jury, beginning February 8, 1966. The pleadings alleged that the amount in controversy, exclusive of interests and costs, exceeded $10,000.00, which allegations were admitted, and depositions and other discovery evidence were on file indicating the extent of the substantial money damages involved. The District Judge, with the agreement of the parties, found at the pretrial there were no jurisdictional issues. (Pretrial Trscpt. Feb. 2, 1966). The evidence upon the liability trial showed

very severe property damage plainly resulting from the accident of October 24, 1963 far in excess of the $10,000.00 jurisdictional requirement.

(b) This Court.

The District Judge directed a verdict in favor of Southern Pacific (and entered judgment thereon) finding that Southern Pacific was entitled to judgment against Western for its losses and denying Western recovery on its counterclaim against Southern Pacific for its losses. (R.T. 447, 448; T.R. 28, 29, 30).

The written Partial Final Decree and Order Directing Entry of Judgment entered by the Court provided, pursuant to the provisions of Rule 54(b), Federal Rules of Civil Procedure, inter alia, that: (T.R. 29)

> "Pursuant to Rule 54(b) Federal Rules of Civil Procedure, the Court expressly determines that there is no just reason for delay and expressly directs that judgment be entered by the Clerk in favor of the plaintiff and counterdefendant, Southern Pacific Company and against the defendant and counterclaimant, Western Constructors, Inc., that said plaintiff have judgment upon its complaint for the losses and damages it legally sustained by reason of the accident of October 24, 1963, near Picacho Junction, Arizona, in such amount as the Court shall hereafter fix and determine and that counterclaimant take nothing by its counterclaim and that the same is hereby dismissed with prejudice."

and, pursuant to the provisions of Section 1292(b), 28 U.S.C., further provided: (T.R. 29, 30)

> "Pursuant to Section 1292(b), 28 U.S.C., the Court is of the opinion that the Order and Partial Final Judgment hereby approved, determined and ordered entered by the Clerk of this Court involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this Order and Judgment may materially advance the ultimate termination of the litigation."

The Partial Final Decree and Order Directing Entry of Judgment was entered by the Clerk on March 21, 1966, and on or prior to March 31, 1966, Western filed in this Court its "Applica-

tion for Permission to Take an Appeal Under Section 1292(b) of Title 28, United States Code, Annotated" which application was considered by this Court April 11, 1966, and such permission was granted.

Western, as counterclaimant, filed its Notice of Appeal to this Court from the judgment denying it recovery upon its counterclaim on March 23, 1966 and Bond for Costs on Appeal likewise on March 24, 1966. (T.R. 31, 32).

Western, as defendant, pursuant to the permission granted by this Court, filed its Notice of Appeal to this Court from the Partial Final Judgment and Order Directing Entry of Judgment finding it liable to Southern Pacific for its damages and its Bond on Appeal on April 15, 1966. (T.R. 39, 40, 41, 42). Counterclaimant-Appellant's Concise Statement of Points to be Relied Upon and Designation of Contents of Record on Appeal were filed March 29, 1966. (T.R. 34, 37). Western as defendant-appellant filed its Concise Statement of Points on April 15, 1966 (T.R. 43) and its Designation of Contents of Record on Appeal on April 19, 1966. (T.R. 46).

The jurisdiction of this Court as to the appeal of counterclaimant is conferred by Section 1291, 28 U.S.C. and as to the appeal of Western as defendant is conferred by Section 1291 and 1292(b), 28 U.S.C.

STATEMENT OF THE CASE

In 1963 the Arizona Highway Department of the State of Arizona was engaged in constructing U. S. Interstate Highway No. 10 between Tucson, Arizona and Phoenix, Arizona, in the vicinity of Picacho or Picacho Junction, Arizona which is roughly half way between Phoenix and Tucson. (R.T. 91-105).

The main line of the Southern Pacific Company between Tucson and Gila Bend, Arizona, passes through this area, running approximately in an east-west direction and generally paralleling the proposed route of Interstate No. 10 to the south of U. S. Interstate No. 10.

In the spring of 1963, the Arizona Highway Department

called for bids for the construction of a segment of this highway and Western was awarded the contract. (Deft's R in Evid.) (R.T. 92). As a part of the Contract Proposal (Deft's R in Evid.) the Arizona Highway Department issued its "Memo to Contractors" (Deft's S in Evid.) in which contractors proposing to bid were advised that a private crossing would be made available to contractors so that earth could be moved across the railroad from the north of the railroad right of way since this was to be the source of earth used to build up the grade of the new highway. (R.T. 99-100).

This Memo To Contractors provided, inter alia:

"The State proposes to provide a crossing of the Southern Pacific Company tracks and to furnish ingress from the highway right-of-way by way of this crossing to Pit (1), Serial No. 5058.

"The State has made application to the Southern Pacific Company for a railroad crossing. It is expected that this application will be formally approved within six to seven weeks.

* * * * * *

"The Southern Pacific Company will require that the contractor enter into an agreement with the Company covering the crossing.

"No direct payment will be made for any of this work, but the cost to the contractor for the work to be performed by the Railway Company, the cost of all flagmen, protective blanket, any insurance requirements that may be specified by the Company and all other costs incurred in connection with the use of this crossing shall be considered as included in the cost of the materials removed from Pits (1) and (2).

"Please attach this memo securely to your proposal pamphlet and be guided accordingly."

Pursuant to the above Memo Southern Pacific prepared and sent to Western, for its signature, a "Private Roadway Agreement" (Plf's Ex. 4 in Evid., R.T. 43) and Western executed and returned the agreement. (R.T. 101). The agreement (Par. 6) contained this provision:

"In consideration of the exposure to hazard of the operations

of Railroad by reason of the construction, maintenance and use of said roadway, Licensee does hereby release and agree to indemnify and save Railroad harmless from and against all liability, claims, costs and expenses for loss of or damage to the property of either party hereto or of third persons, and for injuries to or deaths of Licensee or the agents, employees or invitees of Licensee or third persons or the employees of Railroad caused by or arising out of the presence, maintenance, use or removal of said roadway, regardless of any negligence or alleged negligence on the part of any employee of Railroad."

Under this agreement both Western and Southern Pacific had responsibilities in connection with the construction and use of this crossing *wholly unrelated to the activities of Southern Pacific in operating its trains over its tracks.*

On October 24, 1963, the work was in progress. Carryalls, large earthmoving equipment, were working, crossing over this private roadway crossing to a "borrow" pit on the north side of the railroad tracks, loading a load of dirt and returning south over the tracks to dump and spread this load of dirt to build up the new highway grade. These carryalls averaged about 100 crossings over the tracks per hour. (R.T. 413). The access roadway from the area of U.S. No. 10 under construction and to which the dirt was being hauled to this borrow pit ran approximately north and south and hence crossed the railroad tracks at about right angles to it. (Plf's Exhibit 3C in Evid., R.T. 95).

Harold Kness, an employee of Western, was operating one of these carryalls on October 24, 1963. (R.T. 122). He had driven this same carryall over the crossing approximately 800 times (R.T. 119) and it had never stalled, stopped or otherwise functioned imperfectly in crossing over the tracks in question. (R.T. 115, 119, 120).

The collision occurred at about 4:20 P.M. on October 24th (R.T. 204, 122) immediately east of the overpass (about 300 feet) which took the then existing state highway over the railroad tracks and at the private crossing constructed pursuant to the State Highway permit. This carryall driven by Kness was

returning empty for a load of dirt when it unexpectedly stalled on the railroad tracks (R.T. 125-130) and was struck by the Southern Pacific freight train. There is no claim that Western had any notice that such stalling might occur or that it was otherwise negligent in connection with this occurrence.

The engineer in charge of the diesel engines pulling the train was Lealon C. Henderson. (R.T. 323). Mr. Henderson had been over this route many times during his years as engineer, over a hundred times a year. (R.T. 324). He saw the construction of the private roadway and the crossing of the tracks by the carryalls. (R.T. 327-328). He considered the crossing as dangerous since regularly carryalls were crossing in front of oncoming trains too closely. He termed it "tagging" (R.T. 329, 330) and complained to the trainmaster at Gila Bend. (R.T. 333). He said "some one is going to get hurt." (R.T. 333).

The only action Southern Pacific took to warn Western of this condition was one phone call to the Phoenix office to complain that the carryalls were not stopping before crossing the tracks. (R.T. 414, 415). The Private Roadway Agreement required that Western maintain a flagman at the crossing "for the control of vehicular traffic" but it also provided that this flagman must be "satisfactory" to Southern Pacific. No complaint was made by Southern Pacific to Western that the flagman, Avila, was unsatisfactory. (R.T. 413-415). Southern Pacific did not issue any instructions or otherwise undertake to assure the safe operation of its trains while this dangerous condition obtained. (R.T. 134-135, 273-274, 301-302, 328, 413-415).

The only precaution Henderson took to avoid injury to life and limb of "someone" was to blow his whistle longer and harder (R.T. 336) and reduce his speed (through the area) from 65 to 63 miles per hour, which reduced his speed less than two feet per second. (R.T. 337, 352). Mr. Henderson admitted this had no appreciable effect upon his ability to control the train (R.T. 352) and that his primary reason "in holding your speed down below 65 (miles per hour) when you went through there was

to be sure you (he) were not in violation of the railroad regulation." (R.T. 349). In other words, if he ran over and killed someone he wanted to be sure he did so within the letter of the railroad's regulation.

Q. "And your primary reason for wanting to be sure that you were within the regulation of the railroad was to avoid criticism, if an accident happened, wasn't it?
Was that not a fact?

A. That is a fact." (R.T. 349-350).

The distance from Tucson to Gila Bend by track miles was 131 miles and the running time varied from 2 hours 15 minutes to 2 hours 25 minutes. (R.T. 325). The train was not on any regular schedule and it did not meet any time schedule at Gila Bend (R.T. 324, 325) — it simply changed crews and went on to Yuma, Arizona. Approaching this private roadway crossing from Tucson the crossing was in plain view for as far as the human eye could see — at least 5 miles. (R.T. 326).

The engineer Henderson, at and prior to the accident in question, operated this train consisting of 2 diesel engines and 80 loaded freight cars at a speed in excess of 60 miles per hour as he approached the private crossing (R.T. 357) *without keeping any lookout ahead for vehicles which might be on or approaching said crossing.*[1] This indifference of the engineer to the possibility of injury to anyone on or crossing the railroad tracks continued to the point of collision, or substantially that point.

Based upon the testimony of the engineer given under oath on three different occasions, three versions of how the accident came

(1) The Court's attention is directed to the fact that the statement of the case to this point has been a recitation of the facts, largely undisputed, but that this last statement and the balance of this statement of the case is based upon the evidence and reasonable inferences therefrom, favorable to Western, which the jury might have found and drawn. From this point on appellant invokes the rule that, in considering a motion for a directed verdict in a case tried to a jury, the trial judge shall accept all evidence received and all reasonable inferences therefrom favorable to the party against whom the motion is urged as true and as if such inferences were in fact made. Appellant, likewise, will apply the rules "to look is to see" and "false in one, false in all" (See Post pp. 19-20 "Argument") in presenting the ensuing fact statement.

about, each quite different from the other, could have been found by the jury. Speculation as to which version would or should have been accepted by the jury is profitless since certain facts plainly could have been found, and if found, would clearly support a finding by the jury of wanton carelessness on the part of the *railroad* and Henderson.

1. The ponderous carryalls (Deft's C and H in Evid.) were constantly crossing over the railroad tracks at the rate of approximately 100 crossings per 60 minute period or one every 36 seconds. (R.T. 413).

2. A further dangerous condition existed at the crossing due to the frequency of the crossings and to either (a) failure of the flagman to properly control vehicular traffic; (b) failure of drivers to obey the flagman's traffic directions, or both (a) and (b).

3. The engineer reported to the trainmaster at Gila Bend that "somebody was going to get hurt" at the crossing; (R.T. 333) and testified " * * you were of the opinion that there was likelihood of a collision, right?" Answer (by Henderson) "Yes, sir." (R.T. 334).

4. The carryall was stalled on the crossing in plain sight of the oncoming train and its personnel when the train was at least a mile to a mile and one half away. (R.T. 127-128, 357, 381, 264, 266, 243-247).

5. The train was then traveling in excess of 60 miles per hour. (Deft's Ex. V in Evid.; Appellant's reproduction of Exhibit V in Evid. showing the train's speed prior to and at the point of collision, is reproduced in the Addendum herein as Exhibit 1; R.T. 336-337, 357, 274).

6. The train was still traveling at the same speed when it struck the carryall. (Deft's Ex. V in Evid., R.T. 195, 220; Exhibit 1 in Addendum herein).

7. The engineer made no real effort to slow or stop the train until the collision or so close thereto as to not materially slow the

train. (Deft's Ex. V in Evid., R.T. 360-365, 373, 303, 276-277, 287) (Exhibit 1 in Addendum herein)

8. The carryall was almost off the track; only its "stinger," an iron bar sort of protrusion extending out from the rear of the tractor and used as a ramrod for pushing, was one to two feet onto the south track of the railroad. (R.T. 167, 168, 183, 185, 372).

9. The carryall weighed 70,000 pounds empty. The velocity of the train was so great that it literally spun the carryall around in the air and it struck the train in spinning and ended up facing east after the collision. (R.T. 196, 198).

10. The train's speed tape (Deft's Ex. V in Evid.) (Exhibit 1 in Addendum herein) shows that approximately one and one half miles prior to the collision the train speed was reduced to somewhat above 60 miles per hour and that the train continued at this speed practically to the point of impact with the carryall.

11. Either the engineer was keeping no lookout ahead for traffic at the crossing practically to the point of collision or he was proceeding with reckless indifference to the consequences of his conduct to life and property.

The complaint of Southern Pacific as filed was in three counts. Count One asserted a claim based upon Western's asserted negligence, Count Two claimed contract indemnity against Western and Count Three asserted a claim for breach of a contractual provision of the Private Roadway Agreement whereby Western agreed not to "obstruct" passage of Southern Pacific's trains. Southern Pacific dismissed Count One and Count Three was also dismissed without prejudice (Pretrial T.R. No. 17, p. 8; R.T. 30) and hence only the contract issue presented by Count Two of Southern Pacific's complaint and the negligence charge made by Western in its counterclaim against Southern Pacific were tried.

The District Judge ruled prior to trial that the indemnity provision of the Private Roadway Agreement (Plf's Ex. 4 in Evid.) was valid and obligated Western to pay Southern Pacific's losses unless Southern Pacific was guilty of wanton or gross negligence which was a cause of the collision. (Pretrial, T.R. No. 17, p. 8).

The District Judge held an indemnity agreement was not enforceable upon public policy grounds if wanton or gross negligence on the part of Southern Pacific was involved. *Thomas v. Atlantic Coast Line,* 201 F.2d 167 (CA 5, 1953); *Northwestern National Casualty Co. v. McNulty,* 307 F.2d 432, (CA 5, 1962); 20 A.L.R. 2d 711, 717; and further held over the vigorous objections of Western that Western, having admitted its equipment was on the crossing when the accident occurred, a prima facie case was made out for Southern Pacific and Western had the burden of going forward and of proving gross or wanton negligence on the part of Southern Pacific.

Western completed its case in defense of the Southern Pacific claim and in support of its counterclaim and rested. Southern Pacific moved the Court to direct a verdict in its favor which motion, after argument, the Court granted, (R.T. 447, 448) and entered judgment accordingly. (T.R. 28, 29, 30).

SPECIFICATION OF ERRORS RELIED UPON

I. The trial judge erred in directing a verdict against Western finding it liable to Southern Pacific for its damages and denying Western recovery against Southern Pacific upon its counterclaim for its damages for the reasons:

A. The evidence, including reasonable inferences therefrom, was clearly sufficient to raise a question for determination by the jury as to whether or not Southern Pacific in the operation of its train at and prior to the time of the collision was guilty of wanton carelessness which was the proximate cause of the collision and its losses and the losses of Western and hence the indemnity agreement was inapplicable and voided as against public policy.

B. The Court had erred in placing upon Western the burden of proof as to the fact of Southern Pacific's wanton negligence and hence it erred in directing a verdict against Western for its asserted failure to carry that burden.

C. The indemnity agreement, (Par. 6, Plf's Ex. 4 in Evid.)

properly construed did not indemnify Southern Pacific (and was not intended to indemnify Southern Pacific) against losses arising from and caused by its own negligence and that of its employees in the operation of its trains, which negligence was not interrelated with and which did not arise out of Southern Pacific's negligence in the construction, maintenance and operation of the crossing in question.

D. The indemnity agreement contained in Plf's Ex. 4 in Evid. (Par. 6) was so redundant and prolix and of such confusing grammatical structure as to be ambiguous and hence since reasonable minds could reach different conclusions as to its meaning, the District Judge had erred in holding, as a matter of law, that it obligated Western to Southern Pacific for its losses directly and proximately caused by Southern Pacific's negligence rather than being caused by or arising out of the presence or use of the crossing and hence erred in directing a verdict against Western.

E. The indemnity agreement did not clearly and "beyond peradventure of a doubt" indemnify Southern Pacific against losses suffered by it in the area of the private crossing due to its negligence and that of its employees which losses were not proximately "caused by" and did not proximately "arise out of" the presence, maintenance, use or removal of said roadway but which losses were only remotely caused by and only remotely arose out of the presence, maintenance and use of said roadway. Hence the District Judge erred in holding such indemnity agreement applicable to these losses as a matter of law and directing a verdict in favor of Southern Pacific.

II. The trial judge erred in entering judgment in accordance with the order of directed verdict for all of the reasons given above supporting the statement that the District Judge erred in directing a verdict against Western and in favor of Southern Pacific.

ARGUMENT

The Court Erred in Directing a Verdict Against Western

This is a diversity case. The decisions of the Arizona State Appellate and Supreme Courts as to the circumstances under which

a jury may find a railroad guilty of wanton negligence in operating its trains are therefore persuasive and should have furnished the trial judge guidance.

In *Guaranty Trust Co. of New York v. York,* (1945) 326 U.S. 99, 109, 65 S.Ct. 1464, 89 L.Ed. 2079, 2086, the United States Supreme Court said:

> "In essence, the intent of that decision (Erie) was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a state court. The nub of the policy that undelies Erie * * * is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of a state court a block away should not lead to a substantially different result."

See also: *Monarch Ins. Co. v. Spach,* 281 F.2d 401 (CA 5) (1960)

First off, it should be noted that Arizona, in keeping with the weight of authority, expects that a railroad company shall recognize and respect the obligation it has, because of the unmanageable force it puts into motion in operating its trains, that it must "exercise ordinary care to avoid injuring another when the presence of and danger to such other person is reasonably to be anticipated."

In *Southern Pacific Company v. Bolen,* 76 Ariz. 317, 264 P.2d 401, our Supreme Court first stated the rule, (as applicable to a technical trespasser in that case) and quoted with approval from *Ft. Worth & D.C.Ry.Co. v. Longino,* (Tex.Civ.App., 118 S.W. 198, 201) as follows:

> " 'We take it to be well settled that railroad companies are charged with the duty *of exercising ordinary care to discover the presence of persons on their tracks, and to avoid injuring them at those places where, under all the circumstances, they are reasonably chargeable with knowledge that such persons are liable to be;* and in our judgment it can make no difference, so far as the duty of the railroad company is concerned, whether

such persons are technically to be classed as *trespassers, licensees, or persons using the company's tracks as of right.* In all such cases the duty is imposed because of the broad rule of humanity that one engaged in so dangerous a business is required to exercise ordinary care to avoid injuring another when the presence of and danger to such other person is reasonably to be anticipated. * * at crossings and such portions of its tracks as may be commonly used as footway or crossing, which is known to the company and at which persons may be expected, (railroad company) must use ordinary care to discover their presence and to avoid inflicting injury upon them * * * .'" (Emphasis ours)

Such is the rule in a majority of jurisdictions.

New Orleans and N.E. Ry. Co. v. Anderson, 293 F.2d 97 (CA 5, 1961)

Louisville & Nashville Ry. Co. v. Blevins 293 S.W.2d 246 (Ky.)

St. Louis etc. Co. v. Green, 287 P.2d 700 (Okla.)

Seaboard Air Line Ry. v. Branham, 99 So.2d 621

Jasper v. Chicago G.W. Ry., 84 N.W.2d 21 (Ia.)

Louisville & Nashville Ry. Co. v. Quisenberry, 338 S.W.2d 409 (Ky. 1960)

Both the fireman, Brothers, and the head brakeman, Ameling, in addition to Henderson testified that a dangerous condition existed at the crossing due to the carryalls crossing over before trains (R.T. 272, 299) and at least Ameling reported it to the trainmaster at Gila Bend. (R.T. 273). Brothers stated that two other train engineers had reported that the crossing by the carryalls "might cause a wreck." (R.T. 299)

On June 17, 1966 the Arizona Court of Civil Appeals, (Div. 2) decided *Southern Pacific v. Barnes* (not yet reported) involving many similar fact and law questions.

The Court said:

"The next question raised on appeal is whether it was error for the trial court to permit the plaintiff to elicit testimony from the fireman and the head brakeman who were in the cab

of the engine on the evening of the accident that in their opinion at that time (November 3, 1963) this was a '. . . dangerous' (the head brakeman), '. . . particularly dangerous . . .' and 'extra hazardous' crossing (the fireman). This testimony was elicited over the objections that it was opinion evidence, not binding upon the defendant and immaterial.

"We believe the contentions of the appellant in this regard were considered by our Supreme Court in Alires v. Southern Pacific Company, 93 Ariz. 97, 378 P.2d 913 (1963), and rejected. In the Alires decision the court was dealing with an opinion of the fireman as to the dangerousness of the crossing which was expressed, not in the trial of the action itself, but rather at an inquest. The opinion of this crew member was held to have been wrongfully excluded, the court holding that the opinion so expressed indicated a knowledge of danger which was pertinent to the issues before the court for trial. The court said:

" 'Knowledge by those in charge of the train of the particular bad character of the crossing was relevant not only to determine whether ordinary care was used, but *to determine whether defendant's conduct reached the level of wantonness* —that is, whether the train was being operated with a reckless indifference to the lives and safety of others using the crossing considering the want of special safety measures.' 93 Ariz. at 107-08.

"The fact that the opinion of the crew member is expressed in this case in the action itself, where the opposing party has opportunity to cross-examine, rather than extrajudicially, should not render such evidence inadmissible.

"We do not believe the fact that the fireman was a party defendant in the Alires case is critical to the determination of admissibility. The fireman was one of the employees of the defendant having some measure of control over the train at the time of the collision and his knowledge of the dangerous condition of the crossing would be imputed to his employer, Restatement (Second), Agency Section 272 (1958).

"As in Alires, we are also concerned here with punitive damages. Since the decision of Southern Pacific Company v. Boyce, 26 Ariz. 162, 223 Pac. 116 (1924), it has been the law in this jurisdiction that a railroad employee who is guilty of wan-

ton or gross negligence while acting within the scope of his employment may subject his employer to punitive damages. We do not believe, therefore, that this additional grounds for admissibility of this evidence, as recognized in the above quotation from the Alires case, is rendered inapplicable because the employee is not joined as a party defendant." (Emphasis ours)

The Court then considered if the record supported a jury award of punitive damages of $20,000.00 upon an award of actual damages of $35,000.00 and concluded the evidence was adequate to permit the jury to find wanton or reckless conduct on the part of Southern Pacific.

An extensive review of the evidence would not serve any purpose.

It should be noted that in both *Barnes* and *Alires* the Court placed emphasis, in considering the propriety of a jury's award of punitive damages based on gross negligence, upon the fact the crossing involved was busy. In *Barnes* the Court said:

"*Ajo Way is a heavily-traveled highway just to the south of the City of Tucson,* with vehicles crossing the railroad track on the average of approximately one every ten seconds. As the train crew approached the intersection on the evening in question they could see a number of cars crossing the intersection ahead apparently unaware of the approaching train. *The engineer did not attempt to reduce speed until the very instant of the collision giving rise to this action. The train crew had had near misses at this intersection on numerous previous occasions.*" (Emphasis ours)

In *Barnes* the Court then went on to say:

"* * * The defendant's engineer estimated his speed at the time as 45 miles per hour. The crossing in question is more heavily-traveled by vehicular traffic than the crossing involved in the Alires case, which crossing the court characterized as ' . . . heavily traveled . . .' (93 Ariz. at 101.) * * *"

In *Alires v. Southern Pacific Company,* 93 Ariz. 97, 378 P.2d 913 (1963) the Arizona Supreme Court said:

"The foregoing brings us to a further ground of reversible error. The trial court refused plaintiff's request for an instruction

on the effect of wanton negligence as a bar to contributory negligence. Defendants again argue that the verdicts establish that the jury decided the issues on the basis of non-negligence of the defendants and that since wantonness only bars contributory negligence, the asserted error in the failure to instruct on wanton negligence is academic. In the light of our prior expressed conclusions rejecting defendants' argument an examination of the facts which might support a finding of wantonness becomes necessary.

"Thirty-fifth Avenue was within the incorporated limits of the City of Phoenix and heavily traveled, particularly around midnight when the Reynolds Aluminum Plant changed shifts. The Reynolds Plant bordered both Thirty-fifth Avenue and the Southern Pacific Company right-of-way. Its parking and outside working areas were brightly illuminated by overhead lights so that a motorist in the position of the driver observing for a train would look into the lights of the plant area. The Golden State was approximately one hour and forty minutes late at its last stop and was traveling 79 miles an hour. Other than the customary wooden crossarm near the railroad tracks, there were no signals maintained by the railroad such as an automatic wigwag to attract the attention of a driver of a motor vehicle to the possibility of an approaching train. It was a winter's night. There was, accordingly, a high degree of probability that the windows on an approaching vehicle would be up. The fireman was watching vehicular travel approaching from the south, the opposite direction to the Massey vehicle direction of travel and on the side of the engineer. At this crossing, the vehicular travel, in part, consisted of two other automobiles, one which crossed approximately one hundred feet and the other which crossed approximately fifty feet ahead of the train.

"This Court in determining whether the trial court erred in refusing to instruct on wanton negligence, must assume the truth of the evidence justifying the giving of such an instruction. Bryan v. Southern Pacific Company, 79 Ariz. 253, 286 P.2d 761. If the truth of the plaintiff's evidence is assumed, then it was possible for the jury to believe that there was a high degree of probability that substantial harm would inevitably result to persons in the position of the passengers in the Massey automobile. Hence, prejudicial error was committed in failing to instruct the jury on the effect of wanton-

ness as a bar to the contributory negligence of the adult passengers particularly under the circumstances of this case that defendants asserted contributory negligence in the riding with an intoxicated driver."

See also: *Bryan v. Southern Pacific Company,* 79 Ariz. 253, 286 P.2d 761 (1955) holding that making a "flying switch" of unlighted freight cars without warning signals or attendants at night in a populated area was sufficient to support a punitive damage award.

The generally accepted rule is well stated in 44 *Am. Jur.,* Sec. 484, p. 724 *"Railroads"* as follows:

"* * * An intent on the part of a railroad company to injure the plaintiff is not essential in such cases; it is enough if the conduct of the railroad's employees indicates such wantonness and recklessness as to probable consequences as implies a willingness to inflict injury or an indifference as to whether or not it is inflicted. * * *

"The general rule seems to be that wantonness or wilfulness can exist only in reference to knowledge, actual or implied, of the presence of persons on or about the tracks in a position of peril. Thus, there may be wilful or wanton misconduct prior to the discovery of the person on the tracks, where the peril or likelihood of injury is inherent in the situation, as where a train is operated at an unreasonable speed or without giving proper signals or maintaining a proper lookout at a place where the public is in the habit of using the tracks for a pathway or a crossing, and where their presence is reasonably to be anticipated. * * *"

As we indicated supra, footnote, p. 8, the propriety of the action of the trial court in directing a verdict must be judged in the light of the most favorable construction reasonable men could place upon the evidence and in the light of all reasonable inferences which might be drawn therefrom favorable to Western.

Indemnity Insurance Co. of N.A. v. Atchison, Topeka & S.F. Ry. Co., 85 F.2d 438 (CCA 9, 1936)

Snead v. New York Central Ry. Co., 216 F.2d 169 (CA 4, 1954)

Lumbra v. U.S., 290 U.S. 551, 54 S.Ct. 272, 78 L.Ed. 492 (1933)

Gunning v. Cooley, 281 U.S. 90, 50 S.Ct. 231, 74 L.Ed. 720 (1929)

75 *C.J.S., "Railroads,"* Sec. 884

The United States Supreme Court in *Gunning* thus stated the rule.

"Issues that depend on the credibility of witnesses, and the effect or weight of evidence are to be decided by the jury. And in determining a motion of either party for a peremptory instruction, the court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish, and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deducible from them. Texas & P.R.Co. v. Cox, 145 U.S. 593, 606, 36 L.ed. 829, 833, 12 Sup.Ct. Rep. 905; Gardner v. Michigan C.R.Co. 150 U.S. 349, 360, 37 L.ed. 1107, 1110, 14 Sup.Ct. Rep. 140; Baltimore & O. R. Co. v. Groeger, 266 U.S. 521, 524, 527, 69 L.ed. 419, 422, 423, 45 Sup.Ct. Rep. 169. Where uncertainty as to the existence of negligence arises from a conflict in the testimony or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury. Richmond & D. R. Co. v. Powers, 149 U.S. 43, 45, 37 L.ed. 642, 643, 13 Sup. Ct. Rep.748, 7 Am. Neg. Cas. 369."

Certainly the District Judge, in scanning the evidence before him and in determining if a jury question was presented should apply and give heed to the same rules which he would instruct the jury should be applied by them in their deliberations.

See: *"Federal Jury Practice and Instructions,"* Mathes and Devitt. Sections 71.04 and 72.04 and cases cited. (Falsus in Uno and Inferences defined). *California Jury Instructions,* Fourth Edition, Vol. 1, No. 140 and 140.1. "Looking and Seeing." (Certainly by like reasoning to that supporting the "to look is to see rule," if a witness claims he looked at an object which was plainly visible and testifies that he saw the object do things it didn't do

and saw it was in places where it plainly wasn't, the jury may infer that, in fact, the witness did not look and is fabricating or imagining what he thinks he *should* have seen, had he looked).

Henderson admits giving no thought to the advisability of a reduction in speed to 30 miles per hour (at which speed he could have completely stopped the train in one quarter to one half mile, R.T. 410) to better control the train in the vicinity of the crossing because of the danger even though a reduction to 30 miles per hour would not delay his arrival in Yuma, as a matter of mathematical calculation, over one minute. (R.T. 325).

Furthermore, such a reduction in speed would involve no danger to the train and no operating problem. The up and down strokes on the "speed tape," (Deft's Ex. V in Evid.) indicate that the train's speed could be reduced by thirty miles, in fact, even more, to bring the train to a virtual stop and such was done throughout the run apparently with almost the ease with which a large truck could be managed on the highway.

Henderson's testimony, relating to what he saw occurring at the crossing just prior to the accident (R.T. 358, 359), and where the train actually was when he first observed the carryall, conflicts with the portions of his deposition read into evidence at the trial and his signed affidavit (R.T. 347) and is contrary to what other witnesses observed.

At the trial, he testified to first seeing the carryall proceeding north some 200 yards from the south side of the crossing (R.T. 357, 358), at which time the train was by the water tanks approximately a mile and one half east of the crossing. (R.T. 357). He testified to seeing it stop for a short time prior to moving onto the tracks. (R.T. 359). He denies seeing another carryall cross over the tracks proceeding south while the northbound carryall was stopped. (R.T. 358, 359).

Henderson also testified that when the train was three quarters of a mile from the crossing (R.T. 359, 360), he saw the carryall move onto the tracks and stop. (R.T. 359).

In his signed affidavit dated January 12, 1964, defendant's

Exhibit T in evidence, Mr. Henderson stated:

"When I first saw the carryall it was traveling on said private roadway and proceeding to cross the track from south to north. *I did not observe that the carryall stopped before entering the crossing.* (R.T. 371).

"The carryall proceeded down to the railroad tracks and stopped. I estimated that the unit of the engine was approximately one-half mile east of the private roadway when the carryall first stopped on the tracks. (R.T. 372).

"Before I had time to apply the brakes the carryall started to move and continued until it had cleared the track, with the exception of about two feet. (R.T. 372).

"My engine was opposite the old depot building at Picacho, *about 300 yards from the private roadway crossing when the carryall stopped the second time. I then made an emergency application of brakes."* (R.T. 373). (Emphasis ours)

Apparently, however, in weighing the testimony of the engineer Henderson and the reasonable inferences to be drawn therefrom, the District Judge was not concerned with Henderson's contradictory versions of how the accident occurred and his conflicting statements as to when he first saw the carryall, what it did, when he applied the train brakes and what the carryall operator did.

Apparently he was not concerned with Henderson's claims that he saw the carryall operator doing things which he didn't do, saw the carryall in places where it wasn't and saw it at places at times when it wasn't there.

Certainly he must have disregarded the undisputed testimony that when the emergency brakes are applied "each and every brake on the entire train, from the head of the engine to the caboose (to) lock(s) itself as tight as it can against every brake drum on the train" with the result "many times in the wheels actually sliding," (R.T. 352, 353) and the irreconcilable conflict between the train personnel's testimony claiming early application of brakes and the cold record seen in the speed tape. We respectfully assert that a reasonable man would find it hard to draw any inference but that the train brakes were not applied at all until immediately prior to the collision (if then) since the speed recording device

shows uninterrupted speed of above 60 miles per hour from over one mile prior to the collision to the point of collision.

Certainly a jury would have been concerned, if the trial judge wasn't, with the problem as to whether or not, in fact, the accident, as a serious accident, was not caused by a combination of the engineer "big holing" the train going at a high speed at or immediately prior to the moment of impact coupled with the jolt of the impact with the end of the "stinger" and the resultant whirling of the carryall into the side of the speeding train—something which would never have occurred had the engineer been solicitous in the slightest degree for the safety of those using the private roadway crossing. Certainly the District Judge should have recognized that it was not only reasonable but probable that the jury would conclude the accident was in fact the result of the engineer's reckless or wanton indifference and that of Southern Pacific's management after learning of the dangerous condition at the crossing—to a real and existing danger that "someone will get hurt" at the crossing.

Certainly the jury would have weighed well and long, and the District Judge should have, the significance of the engineer, Henderson's, remark to the fireman, Brothers:

Q. "And as you were approaching it, we will say from Picacho on, did you have any conversation or hear Mr. Henderson say anything?

A. "Well, as we was approaching Picacho, (2 miles east of the crossing, R.T. 158) why, I was looking ahead and Mr. Henderson said something to me, and I didn't understand, and so I got up and walked over and leaned over the cab and asked him what he said, and he said, 'I hope it stops.'"

* * * * * *

Q. "Well, now, after he said 'I hope it stops,' did you say anything to him?

A. "Yes, I asked him 'What,' and he said, 'That carryall.'

Q. "I see. And did you at that time see the carryall?

A. "I seen the carryall then.

* * * * * *

Q. "Well, at the time you had this conversation, and he said I hope it stops, or he stops, that was about half a mile?

A. "A little over half a mile.

Q. "I see, and then you looked and saw this carryall?

A. "Yes, sir.

Q. "And where was the carryall when you saw it?

A. "Well, it was about 80 feet—

Q. "How far?

A. "About 80 feet, or two car lengths from the main line.

* * * * * *

Q. "And was he standing still, or was he moving?

A. "He was moving towards—from the south he was going north toward the main line.

Q. "Would you then still say it was 80 feet from the crossing?

A. "Well, when you are looking at it, it was approximately two car lengths, or between a car and a half or two car lengths. I said two car lengths, but it could have been closer, maybe a car length.

Q. "And how fast was it turning, was it moving?

A. "Well, that is hard for me to say, because we was looking at it up, it was moving, but it might have been four miles an hour, it might have been six miles an hour.

Q. "And you were traveling something over 60?

A. "We was traveling approximately 60 miles an hour.

Q. "And you were just about half a mile away?

A. "Yes, sir.

Q. "So that if you are half a mile, it would be 30 seconds from the time you saw the carryall until you arrived at the crossing, is that right?

A. "Yes sir." (R.T. 292, 293, 294, 295)

In sum, someone was not telling the truth. Kness said he stopped to let the loaded carryall driven by Eagar cross over ahead of him (R.T. 122, 123) and that when he pulled onto the crossing the train was at least a mile to a mile and a half away. (R.T. 127, 128). His carryall then stalled, he jumped off and with Avila's help pushed it until it stopped when it had almost cleared the crossing. Kness then went back to see if it had cleared the

tracks, found it hadn't entirely cleared the tracks and attempted unsuccessfully to again push it further but couldn't budge it since it was then fully stopped. (R.T. 166-169). The train was then so close that he abandoned the effort and retreated some distance away and turned and saw the collision. (R.T. 190). Neither Kness nor Avila could see any evidence of the train slackening speed prior to the impact—there was no screeching of brakes or sliding of wheels prior to impact. (R.T. 195).

Eagar testified to driving up to the crossing and across it while Kness was waiting in the drive out bay on the south side of the tracks (R.T. 243, 244) and to then driving the haul road with his heavily loaded carryall— a goodly distance (see Deft's Exhibit I in Evid.) up the ramp to the grade which they were building and to the far or west end of this area and there dumping and spreading his load. This had been completed and Eagar was turning around when the accident happened. (R.T. 244, 245, 246). Certainly a minute and one half would be the minimum time required for this procedure on the part of Eagar so that when Kness was waiting at the south passing bay to cross the tracks the train had to be well over one mile away coming at 60 miles per hour. Yet Brothers testified that they first saw the Kness carryall when it was about 80 feet—maybe 60 feet away from the crossing, traveling at about 4-6 miles per hour after which while the train travelled one half mile—30 seconds—the carryall drove up to the crossing and stopped—started up—pulled onto the crossing—stopped—was pushed, probably 30 feet (R.T. 166, 167)—stopped—Kness went to its rear and saw it was foul of the south track (R.T. 168)—tried to push again—then with the train some hundreds of feet away—at the small bridge to the east he retired some distance away and saw the carryall literally spun around in the air by the velocity of the train on impact. (R.T. 195, 196, 197, 198).

We respectfully assert that with the foregoing testimony before any jury, the conclusion which would be unequivocally drawn by the jury would be that Henderson was paying absolutely no at-

tention to what was ahead of the train approaching or on the crossing and that his testimony constituted an attempt on his part to reconstruct the accident in a light most favorable to him. If anything would supply the clincher to this conclusion, it would be his testimony that at three fourths of a mile from the accident scene he "set the air, I started to stop." (R.T. 390). He further testified:

Q. "And what did he do after he pulled up on the track and stopped?
A. "He evidently killed his motor.
Q. "I didn't ask you that. I asked you, what did he do, what did you see him do?
A. "I saw him working, or working the controls.
Q. "You saw him like he was trying to start it, did you?
A. "That is right.
Q. "How long would you say he stopped there, Mr. Henderson?
A. "I don't know. Very shortly.
Q. "Long enough that you saw him apparently doing something toward starting the motor?
A. "Yes, sir.
Q. "Then it started up and went further?
A. "Yes, sir.
Q. "And in this period of time when it was sitting there, were you doing anything toward stopping the train?
A. "Yes, sir.
Q. "What were you doing?
A. "Setting the air.
Q. "How much. Trying to stop it as hard as you could?
A. "No, sir, I didn't go to emergency.
Q. "But short of emergency?
A. "Yes, sir.
Q. "Then what happened?
A. "He started up again.
Q. "Then what happened?
A. "He stopped again.
Q. "Where did he stop?

A. "Just north of the track about—and I thought he was clear.

Q. "You thought he was clear?

A. "I thought he was probably clear, yes.

Q. "Have you thought so at all times since the accident, that you thought he was clear at that time, Mr. Henderson?

A. "I didn't know until I was right on top of him, where I could see.

Q. "I beg your pardon, sir. Did you prior to today ever make this statement to anyone, that you thought he was in the clear at that time?

A. "No, sir, I didn't know. But I thought that maybe he could be.

Q. "In any event, what did you do after he stopped the second time?

A. "I went to emergency.

Q. "Even though you thought he was clear.

A. "Yes, sir, because I had already gone to emergency when he stopped the second time.

Q. "So you thought he was in the clear, but you left your train grinding its wheels on the track to stop, did you.

A. "Yes, sir.

Q. "And you didn't stop?

A. "No, sir." (R.T. 361, 362, 363)

Henderson, therefore, contrary to the fact testified he saw Kness doing things after the carryall came on the tracks which Kness and Avila plainly testified Kness did not do and which the other trainmen also said did not happen (at least they were looking and said they didn't see it). (T.R. 270, 271, 295, 296). Henderson in addition to giving widely varying versions as to the course of the carryall in coming onto the track as hereinbefore outlined, claimed he saw it first stop (after coming on the track) and saw Kness trying to start it and in fact getting it started and saw the carryall move forward and again stop and that when the train was only 300-500 feet away Kness for the first time got out of the driver's seat and left the area of the carryall. (R.T. 359, 365).

Kness in fact had jumped off the carryall before it came to a

full stop (R.T. 128, 166) on the crossing and when the train was over one mile away (R.T. 194, 127, 128) yelled to Avila to help him (R.T. 166, 182), pushed on the rear wheel and he and Avila pushed the carryall and kept it moving. (R.T. 128, 166). The carryall never did come to a full stop on the crossing the first time and if it had Kness and Avila could not have moved it. (R.T. 168, 190). Kness didn't try to restart the diesel, for it was started by a separate gasoline engine which would take about one minute to start. (R.T. 120, 121).

It is respectfully submitted the trial judge wholly failed to comprehend and give effect to the applicable rules governing the function of the trial court trying a case to a jury on a motion for a directed verdict and the responsibility of the trial court to respect the function of the jury, particularly in a federal court under the constitutional guaranties of the Seventh Amendment to the Constitution of the United States.

The losses sustained by Southern Pacific were not legally caused by and did not legally arise out of the presence, maintenance or use of the private roadway

The critical phrase in Paragraph 6 of the Roadway Agreement is found in the last three lines of Paragraph 6. The injury must be one "caused by or arising out of the presence, maintenance, use or removal of said roadway."

Unless we are to reverse the rule universally applied in the construction of undertakings of a noncompensated surety, viz., that the language of the indemnity agreement is construed strictly in favor of the indemnitor and indemnity is to be denied unless clearly required by the letter of the indemnity agreement (See also: *Employers Casualty Co. v. Foley,* 158 F.2d 363 (CCA 5); 143 A.L.R. 312, p. 315 et seq.) it must be concluded that the intent of this phrase is that the harm must be "legally caused by" and "legally arising out of" the presence, etc. of the roadway.

That this is so is buttressed by the fact Southern Pacific, by a separate unrelated contract provision of the Private Roadway Agreement required of Western the agreement "Licensee (West-

ern) shall not obstruct, or interfere with, the passage of Railroad's trains" (Par. 3) and originally declared in Count Three of its Complaint for breach of this undertaking. However, Southern Pacific elected to prosecute only its claim under Paragraph 6 for indemnity and Count Three was dismissed.

Count One, in negligence, was also dismissed. No claim is made that Western could have foreseen or prevented this accident; no claim is made that any act or omission of Western's brought about this unhappy occurrence. The sole, proximate cause of the accident was the reckless indifference of Henderson to what lay ahead of the juggernaut which was hurtling down the track under his hand but without control by him or concern on his part for the probable consequences should someone be on the track ahead.

Unless it be found that the accident was legally caused by or arose out of the presence and use of the roadway further inquiry as to the cause of the accident serves no purpose since Western is here charged with losses legally springing from that source.

A brief resume of the background of Paragraph 6 and of principles applicable to this problem may be of service. If not the pages will turn quickly.

The Private Roadway Agreement containing the indemnity agreement was required of Western by the Bid Proposal issued by the Arizona Highway Department (Deft's Ex. R in Evid.) for construction of the section of Interstate No. 10 here involved.

> "The Southern Pacific Company will require that the contractor enter into an agreement with the Company covering the crossing.
>
> * * * * * * * * *
>
> "Please attach this memo securely to your proposal and be guided accordingly."

The instrument was prepared by Southern Pacific and mailed to Western for execution and executed by Western as received. (R.T. 101, 102).

The agreement was not a negotiated agreement but was pre-

pared by Southern Pacific and sent to Western for execution. Therefore on this score also it is to be construed against Southern Pacific and any ambiguities therein resolved against Southern Pacific.

Alcoa S.S. Co. v. U.S., 70 S.Ct. 190, 338 U.S. 421, 94 L.Ed. 225
Kingman Water Co. v. U.S., 253 F.2d 588 (C.A. Ariz.)
J. C. Millett Co. v. Distillers Distributing Corp., 258 F.2d 139 (C.A. Cal.)
Reiss v. Murchison, 329 F.2d 635 (C.A. Cal.)
Prudential Ins. Co. v. Goodman, (Pa.) 152 A.2d 664.

Since Plf's Ex. 4 in Evid. is a form agreement insofar as Paragraph 6 is involved, plainly prepared for multiple use, we may assume that Southern Pacific had exercised care in its preparation and that the words employed to express the engagements of the parties thereto were employed deliberately and with the intent of thereby stating and limiting the obligations assumed and due under it (from Western).

John J. Davis Co. v. Shepard Co., 47 A.2d 635 (R.I.)
Commonwealth v. Henry W. Horst Co., 72 A.2d 131 (Pa.)

In *County of Alameda v. So. Pac. Co.*, 360 P.2d 327, 333 the Supreme Court of California said:

> "Finally Southern Pacific prepared the contract, and it is thus to be strictly construed against it. Civil Code, § 1654; Weil v. California Bank, 219 Cal. 538, 541, 27 P.2d 904; Payne v. Neuval, 155 Cal. 46, 50, 99 P.476. *It is reasonable to conclude that Southern Pacific, having carefully provided in express terms for indemnity for its own negligence in two particulars, would have likewise made express provision for indemnity against liability based on its negligent failure to maintain the spur track in proper condition if it had intended to bind Rock to such an obligation.*" (Emphasis ours)

In like fashion we can say that if Southern Pacific here intended to bind Western to indemnify it for damage only remotely flowing from the presence and use of the crossing, which damage flowed proximately from its operation of its trains in a negligent manner, it should have said so.

The principle also is applicable that a contract will be given

a reasonable, fair interpretation. Any construction which would produce an unfair, unusual or improbable result will be avoided, if possible. Thus a construction which would make Western responsible for the operation of the railroad, over which it had neither supervision and control nor the right to supervision and control, as distinguished from the management, installation and use of the roadway and related structures involving responsibilities of railroad employees (over which it had the opportunity to supervise and observe the activities of the railroad employees) is unreasonable and not to be accepted unless clearly required by the plain and unambiguous terms of the agreement.

Continental Bus System, Inc. v. N.L.R.B., 325 F.2d 267 (C.A. Colo.)

Texaco, Inc. v. Holsinger, 336 F.2d 230 (Cert.den. 379 U.S. 970) (C.A. Kan.)

National Sur. Corp. v. Western Fire & Indemnity Co., 318 F.2d 379 (C.A. Tex.)

Osborn v. Boeing Airplane Co., 309 F.2d 99 (C.A. Wash.)

Since we are dealing with a contract of indemnity the particular limitations applicable to such contracts become important.

In *Employers Casualty Co. v. Howard P. Foley Co.,* 158 F.2d 363 (CCA 5) the rule is stated:

"* * * On the other hand it is certainly the general rule that, where the indemnity is not contracted for from an insurance company whose business it is to furnish indemnity for a premium and where indemnity is the principal purpose of the contract; but from one not in the indemnity business and as an incident of a contract whose main purpose is something else, such as a sub-construction contract, the indemnity provision is construed strictly in favor of the indemnitor. The cases regarding such provisions in a subcontractor's agreement with the main contractor are reviewed in the recent note to Walters v. Rao Elec. Equip. Co., 143 A.L.R. 312, and especially Par. III, page 315 and ff. They are all found to deny a liberal construction in favor of the contractor."

To the same effect:

Halliburton Oil Well Cementing Co. v. Paulk (CA 5) 180

F.2d 79, wherein the Court said:

"This is particularly true where the result would be to indemnify against one's own negligence and it will not be so construed *unless such obligation is expressed in unequivocal terms.*" (Emphasis ours)

Southern Bell Tel. & Tel. Co. v. Mayor (CCA 5), 74 F.2d 983

Williston on Contracts (Revised Ed.) Vol. 6, Sec. 1825, n. 8

DeTienne v. V. S. Nielson Co., (Ill.) 195 N.E. 2d 240

Westinghouse Elec. Co. v LaSalle Corp., 70 N.E.2d 604

Brown v. Moore, 247 F.2d 711 (CA 3)

Smith v. Ohio Oil Company, 356 S.W. 2d 443

Turner Const. Co. v. W. J. Halloran etc. Co., 240 F.2d 441 (CA 1)

The oft quoted case of *Perry v. Payne* (Pa.) 66 Atl. 553, 11 L.R.A. N.S. 1173 teaches:

"It is contrary to experience and against reason that the contractors should agree to indemnify Perry (owner) against the negligence of himself or his employes. It would make them insurers, and impose a liability upon the contractors, the extent of which would be uncertain and indefinite, and entirely in the hands of Perry. * * * A single act of negligence on the part of the owner or his employes, *over whom the contractors would have no restraint or control whatever,* might create a liability which a lifetime of successful business could not repay." (Emphasis ours)

In *Boise Cascade Corp. v. Nicholson Mfg. Co.,* 221 F. Supp. 135, Judge Solomon said:

"* * * The court found that the loss had been caused by the *sole negligence* of the railroad and denied recovery, relying on the 'firmly established rule that contracts of indemnity will not be construed to cover losses to the indemnitee caused by his own *sole negligence* unless such intention is expressed in clear and unequivocal terms.' Southern Pacific Co. v. Layman, 173 Or. at 279, 145 P.2d at 296.

"In marshalling the reasons behind this rule of construction, the court pointed out that when a general indemnification clause may operate without including the negligence of the indemnitee, it will not be presumed that it was intended to include it.

" 'The liability of such indemnity is so hazardous, and the character of the indemnity so unusual and extraordinary, that there can be no presumption that the indemnitor intended to assume the responsibility unless the contract puts it beyond doubt by express stipulation. No inference from words of general import can establish it.' Southern Pacific Co. v. Layman, 173 Or. at 279, 145 P.2d at 296, quoting Perry v. Payne, 217 Pa. 252, 262, 66 A. 553, 557, 11 L.R.A., N.S., 1173 (1907)." (Emphasis ours)

This accident was not caused by the use of the roadway (even as the sole *remote* cause); it was legally caused by the sole negligence of Southern Pacific. At the very outset of Paragraph 6, Southern Pacific limits the hazard under contract consideration to the hazard to the operations of Southern Pacific *by* reason of the *construction, maintenance* and *use of the roadway.* There is no hint here that any hazard is to arise from any improper or careless operation of the railroad. The *sole hazard contemplated* is that arising from the roadway and its use. At this point, if Southern Pacific had desired to fairly apprise Western that it was, in effect, signing a blank check, guaranteeing the efficient and careful operation of the railroad over which Western had no possible control or even forewarning of careless operation of the trains on the road, it should have said so.

Thereafter the agreement spells out joint obligations and undertakings by both Southern Pacific and Western as to the installation, maintenance and use of said crossing. Each party, in respect to these undertakings, might be found negligent. Since these were all local undertakings subject to scrutiny and complaint by Western if not properly done, particularly since Western was a day by day observer in these matters, it is understandable that Southern Pacific would put upon Western the burden of supervision and care as to these local installations and functions and that Western would agree to that responsibility.

With these considerations in mind the language of Paragraph 6 becomes clear and reasonable.

The language of Paragraph 6 does *not* say caused by or arising,

in whole or in part by the roadway; *it must be caused by the roadway,* not by the roadway as a remote cause and the active negligence of Southern Pacific's employees as the proximate cause.

Southern Pacific, a common carrier, is the author of the agreement here involved so we may assume that the use of the phrase "caused by" was employed by it with the meaning ascribed to it in common carrier cases considering this phrase. Cf. Title 49, Sec. 20 (11) U.S.C.A.

In a very early case, oft cited, *Morrison v. Davis,* 20 Pa.St. 171, the defendant carrier used a lame horse in hauling a boat in a canal, resulting in a delay of the boat. Because of this delay the boat did not make progress as it should and was struck by a flood which it would have avoided had a sound horse been employed. The Court held that the use of the defective (?) horse was a remote cause of the injury and the carrier was not therefore the cause of the loss. (Here a "lame" engine delayed the normal progress of the carryall).

In *Memphis Ry. Co. v. Reeves,* 10 Wall. 176, 192, 19 L.Ed. 909, the defendant carrier contracted to start with a load of tobacco the evening before it did move the tobacco, as a result of which breach the shipment was caught in a flood. The Supreme Court, citing *Morrison,* held the breach only a remote cause and hence the carrier was not liable.

A case approaching controlling force in this fact situation, *Standard Oil Co. v. Payne,* 190 N.W. 769, was decided by the Supreme Court of Michigan in 1922. The facts are as follows:

Standard Oil Company owned a petroleum distribution center abutting the railway tracks. The railroad constructed a side track alongside this petroleum plant under an agreement containing an indemnity clause in favor of the railroad as indemnitee in which the Court summarized for purposes of its opinion as follows:

> "Under this contract the defendant is exempt from liability for —
>
> " 'loss or damage by fire upon premises owned or occupied by

second party (plantiff) arising from the operation of said track for benefit of second party."

The Court also summarized counsel's contentions as follows:

"Plaintiff insists that —

" 'A reasonable construction of this clause of this contract means this, that the loss and damages must arise from some act that was being performed for the benefit of the plaintiff at the time, and that this act must be the cause of the fire and damage.'

"Defendant's counsel say:

" 'These words mean "having as a cause, without which the result would not have been produced, the operation of the side track." ' "

On the day of the accident the railroad delivered on this siding five cars of gasoline. A box car which was sitting on the siding was shunted out onto the main track as a part of the delivery operation. After the box car had been switched by the engine and tanker cars to the main track, the tankers were then pushed through an open switch onto the siding and the switch was left open while the crew were engaged in spotting these five tankers on the siding. While so engaged the switch crew heard a train on the main track approaching. The box car was in plain view and the engineer on the switch engine attempted to attract the attention of the engineer of the approaching train by sharp blasts on the whistle but in vain. The train came on with unabated speed, crashed into the siding through the open switch and into the tankers, setting them afire.

Standard Oil sued for its damages and was met, as here with the defense of the indemnity agreement.

The Court said:

"* * * Along came the freight train on the main track. It had no occasion to enter the siding. It did so enter, not for the purpose of using it for the benefit of plaintiff or for any purpose in the furtherance of the business of either plaintiff or defendant, but because of the negligence of its engineer in failing to observe that the switch was open, notwithstanding the switch signal and the presence of the box car in plain view

on the main track. That his action in doing so was clearly negligent is not denied. His train collided with and wrecked the switching train. This negligent conduct of the engineer was therefore the proximate cause of the damage plaintiff sustained on account of the fire. Defendant's counsel so concede in their reply brief:

" 'The loss was due, it is true, to the negligence of the defendant's engineer on the freight train, but, except for the use of the side track for the benefit of the plaintiff at the time, his act would not have caused the fire.'

"Had there been no contract, the liability of the defendant would have been clearly established. Plaintiff's counsel urge that the exemption from liability provided for in the contract does not relieve unless it appears that the use of the side track for plaintiff's benefit *was the proximate cause* of the loss." (Emphasis ours)

The Court then considered the rule requiring that the carrier must be either the proximate cause of a loss or a concurring proximate cause of a loss before it can be held liable where an act of God or other exception to its common carrier liability is involved. The Court then said:

"* * * An ordinary contract of carriage exempts from liability for loss arising from or happening by reason of an act of God. If a carrier may only have the benefit of this defense when it appears that the 'Act of God' is the proximate cause of the loss, must it not also appear when the contractual provision is relied on as a defense that the act of the switching crew in leaving the switch open, an act arising from 'the operation of the track' for plaintiff's benefit, was the proximate cause of plaintiff's loss? We feel constrained to so hold. While the loss would not have occurred had not the switch been left open, the loss in the cases cited to sustain the rule would not have occurred without the happening of the untoward event, spoken of as the 'act of God.' In this case, as in those, the act relied on as a defense would not have caused a loss but for the intervention of a new agency, unrelated to that relied on for exemption, and which in itself was the proximate cause of the loss."

See also *Kirby v. Oregon Short Line Ry. Co.*, 197 P. 254 (Mont.) *Fort Worth etc. Ry. Co. v. Lemons*, 258 S.W. 1095

(Tex.); *Standard Pickle Co. v. Pere Marquette Ry.,* 193 N.W. 300; *Rotundo v. Erie Ry. Co.,* 198 N.Y.S. 688; *Hadba v. Baltimore & Ohio Ry.,* 170 N.Y.S. 769.

The question then is: Can it be said, viewing the facts fairly and objectively, that the collision was caused, in contemplation of law, by the carryall, sitting there helplessly but only in a position of peril to its driver and to the railroad if the railroad, acting in relationship to a matter wholly under its control and, in fact, unrelated to the private roadway, acted in disregard for its well defined obligation to those who it well knew might cross its path?

The Court Erred in Placing the Burden of Proof on Western

In effect, the District Judge held that the fact of a collision between the carryall of Western and a Southern Pacific train at the crossing in question raised a presumption that the collision and resulting damage was legally caused by and arose out of the presence and use of the crossing and within the meaning of the indemnity clause of the Private Roadway Agreement. In this the District Judge erred.

1. Western *admitted* no more than that a collision occurred between its carryall and a Southern Pacific train at or on the private crossing of the railroad tracks, the use of which was governed by Plf's Ex. 4 in Evid. Western to this extent—*and only as to these facts*—waived a trial by jury by its admission.

Southern Pacific was an actor as well as Western in causing the accident. It does not follow inescapably and as a matter of law that because a carryall was on the crossing and a train ran into it that this accident was legally caused by or arose out of the presence or use of the roadway; it does not follow as a matter of law that the conduct of the engineer Henderson and the railroad itself, amounted to no more than simple negligence. Western was entitled to have the jury draw its own inferences from the facts surrounding the accident as exposed upon a trial of the vital issue of causation.

This Court, in *Guerrero v. American-Hawaiian Steamship Company,* 222 F.2d 238 (1955) dealt with the usurpation of the prerogatives of a jury, when a trial by jury has been demanded, in a case somewhat akin to this, as follows:

"* * * Neither the motion for a summary judgment, nor anything the court said, remotely indicate that the seaman ever *admitted* in his testimony that the release was valid. Appellee, it is clear, was under the impression that every essential to the validity of the release was proved and this was the court's view. But there is no contention that appellant seaman admitted that the evidence established such alleged fact. Here, unquestionably, was a question of fact which, under the Seventh Amendment, could be resolved only by a jury from the evidence in the case.

"As was said in Slocum v. New York Life Ins. Co., 1913, 228 U.S. 364, 386-387, 33 S.Ct. 523, 532, 57 L.Ed. 879:

"'But, without a waiver of the right of trial by jury, by consent of parties, the court errs if it substitutes itself for the jury, and, passing upon the *effect of the evidence,* finds the facts involved in the issue and renders judgment thereon.'

"The situation just alluded to by the Slocum case was where a verdict had been reached but the judgment had been set aside. In referring to a demurrer to the evidence in the same case, the court said, 228 U.S. at pages 388-389, 33 S.Ct. at page 533:

"'* * * and the admission (of facts on demurrer) * * * must be of the facts, and not merely the evidence from which their existence is inferable.'

"So inclusive is the rule (that the facts must be found by a verdict of the jury) that even in cases tried to a jury and verdict rendered, the right of the court to order a judgment upon the ground that the plaintiff has made no case, is extremely limited. * * *" (Emphasis the Court's)

Whether or not the presence or use of the private roadway legally caused or gave rise to the accident and resultant damage is just as truly a fact to be found by the jury as was the fact of the validity of the release in *Guerrero.*

The language of Paragraph 6 does not meet the requirements of certainty and of "crystal clear" language necessary to imposing liability upon Western as a non-compensated surety and hence the District Judge erred in imposing liability upon Western as a matter of law

Appellant does not assert that Paragraph 6 was purposefully designed as a trap for the unwary; appellant does assert it was, as written, in fact, such a trap.

Since the agreement was one which appellant was in reality forced to sign—either that or withdraw from the bidding—common fairness would have indicated that the true hazard which Southern Pacific now claims Western assumed, should have been reasonably clearly stated. The contrary is the fact.

At the threshold of a consideration of the meaning and purpose of Paragraph 6 the understanding of the reader is directed to, first the cause of the hazard, the subject of the contractual indemnity, which is stated to be one arising "by reason of the construction, maintenance and use" of the private roadway.

Next the reader is told that this hazard is to "the operations of Railroad." What operations? The expected, normal, lawful and careful operations, for since the facet of the Railroad's involvement in the crossing use is here directly under contractual consideration in fairness and for clarity and precision of expression, if operation of the railroad other than normal operation is contemplated, this is the place to say so. If Railroad contemplated that Western should knowingly assume responsibility for *its sole negligence,* if such an obligation was to appear "crystal clear" and "beyond peradventure of a doubt" here was the place for the caveat.

There is no hint, even, of this. The hazard here pointed to arises only from one source, the construction and use of the roadway. True, it is to the operations of Railroad but it is to the usual, normal and careful railroad operations which are pointed to by the Railroad as the source which should be of concern to the indemnitor.

The reader is then led through a confusing mumbojumbo of words to find that the loss governed must be one "caused by or arising out of the presence, maintenance, use or removal of said roadway."

Then follows, almost as an afterthought and as of really no great significance, the real "hooker"—the seemingly innocuous "tail to the kite" as deadly as the tip of the scorpion's tail—"regardless of any negligence or alleged negligence on the part of any employee of Railroad."

What language of the paragraph does this "regardless" clause modify? To what does it refer back? Certainly not "operations of Railroad" for that is not the verb of the sentence. After harkening back to principles of grammar long since forgotten but refreshed by "A Writer's Manual and Workbook" (Paul Kies, F. S. Crofts & Co. (N.Y.)) Chapter 13, p. 79 et seq., we conclude that the phrase "regardless of the negligence etc." is what Mr. Kies would term a "squinting modifier"—as such it is unclear whether it modifies the "save harmless" language or "arising out of or caused by" language of Paragraph 6.

If the save harmless (etc.) language of the agreement modifies negligence (but not sole negligence?) of Railroad then Western is liable (barring wanton or perhaps sole negligence of Railroad). But if it modifies the second clause "caused by or arising out of" then it is inapplicable to the negligence of Railroad in the operation of its train and the District Judge erred in denying Western's Motion for Summary Judgment based upon its contention that the indemnity clause did not cover the loss in question and in directing a verdict against Western.

The mishmash of words which make up this one sentence of Paragraph 6 is demonstrated if we parse the sentence.

a. *Licensee* is the subject;
b. *does release and agree* is the compound verb;
c. *to indemnify and save* is a compound infinitive object of the verb;

d. *Railroad {x} harmless* is an infinitive phrase object of the infinitive *to indemnify;*

e. *and save harmless* is the predicate adjective of the understood infinitive *to be;*

f. *hereby* is an adverb modifying the verb;

g. *in consideration of the exposure to hazard of the operations of Railroad,* are four escalated prepositional phrases the total of which modify the verb;

h. *by reason of construction, maintenance, or use of said roadway* are escalated prepositional phrases modifying *exposure;*

i. *from and against liability, claims, costs, and expenses for loss or damage to property of either party hereto or of third persons* are escalated and compounded prepositional phrases modifying *harmless;*

j. *and for injuries to or deaths of Licensee, agents, employees, or invitees of Railroad* comprise the final escalated part of the compounded prepositional phrase, two-thirds of which had already been completed before beginning the third and last part, the sum total of which modifies *harmless;*

k. *caused by or arising out of presence, maintenance, use, or removal of said roadway* are participial phrases modifying the objects of the compounded prepositional phrases mentioned above;

l. *regardless of any negligence or alleged negligence on the part of any employee of Railroad* is another escalated set of prepositional phrases claimed by Railroad to go back to the beginning and modify *harmless.* This is by no means clear.

This indefiniteness with respect to what the last set of prepositional phrases modifies renders the paragraph most ambiguous. Due to the mixed up grammatical structure of Paragraph 6 it is just as reasonable to conclude that the negligence on the part of the Railroad which is the subject of the indemnity is negligence *in connection with its obligations related to the use, con-*

struction, maintenance and removal of the crossing as to contend that it relates back to the beginning of the sentence and embraces all of the entire paragraph which precedes the final clause of the sentence.

If we diagram the sentence the confusion engendered by this "futuristic" use of language becomes more apparent. (See Ex. 2, Addendum). In this diagram the phrase "regardless of etc." is of necessity left suspended because it is unclear what it modifies.

Appellant contends that properly construed, the indemnity agreement, Paragraph 6, indemnifies the Railroad only against the negligence of Railroad employees in the discharge of its duties as to the *construction, maintenance and use of the private roadway resulting in property damage to either the Railroad, appellant or third persons* or *in injury or death to the agents, employees and invitees of Licensee-appellant and Railroad,* such negligence being occasioned, caused by or *arising out of the presence, maintenance, use or removal of said roadway.*

It does not, as appellee contends, refer to the sole negligence of Railroad and its employees in the running of its trains, something entirely beyond the control and foreseeability of Western.

Even if it be concluded that it is equally clear that the "regardless" clause may modify "save harmless" nonetheless the District Judge erred in directing a verdict since the Railroad had not demonstrated by crystal clear language that the indemnity embraced losses proximately caused by its sole or contributory negligence. The best way to characterize this type of prolix and verbose language exemplified by Paragraph 6 is "legal tanglefoot."

CONCLUSION

We respectfully submit, for all the foregoing reasons the judgment of the District Court should be reversed with instructions (a) To dismiss Count Two as not supporting a claim for indemnity against a non-compensated surety or, in any any event

(b) to grant appellant a new trial both as to the complaint of appellee and as to the counterclaim of appellant.

Respectfully submitted,

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SALMON & TRASK
and CHARLES ESSER
SNELL & WILMER

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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

_____

Attorney

Appendix

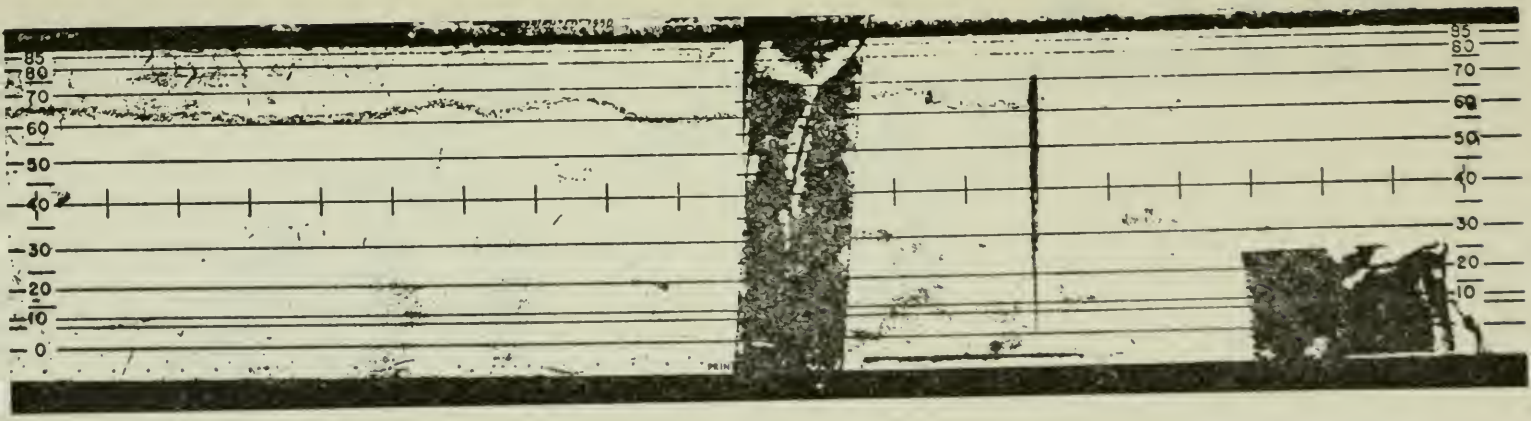

Exhibit 1

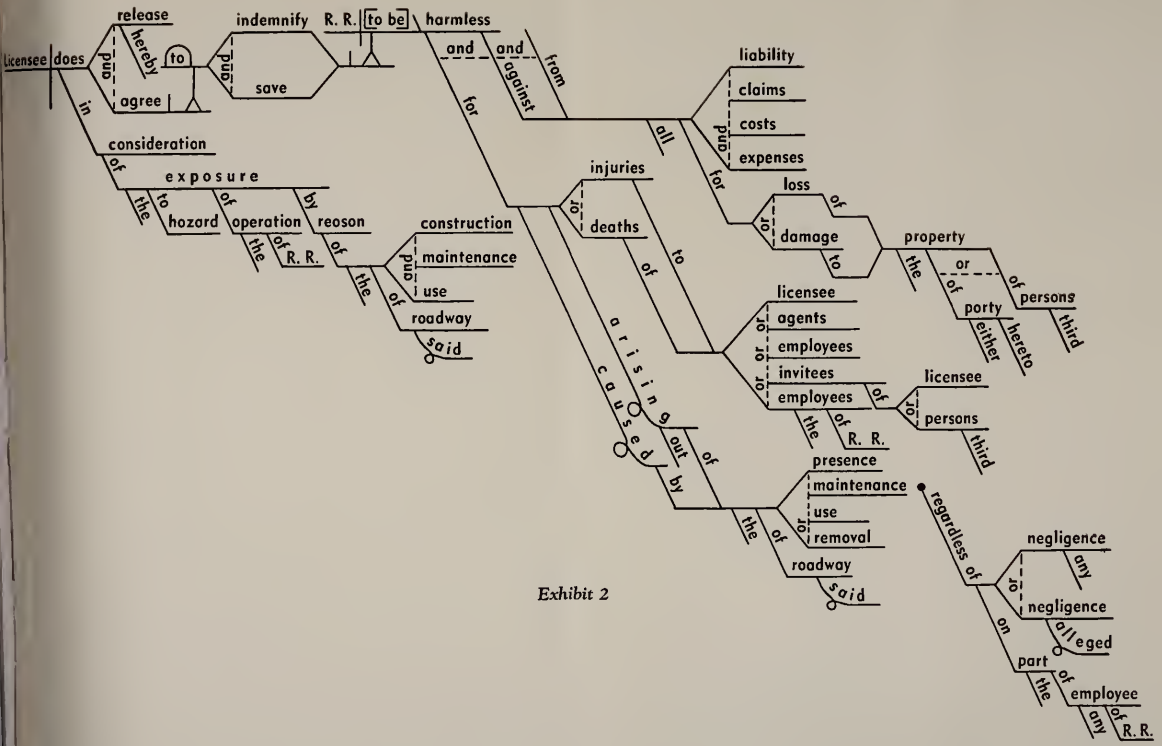
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Exhibit 2